Rira Bina Sdn Bhd v GBC Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–805 OF 2009
LEE SWEE SENG JC
9 DECEMBER 2010

Civil Procedure — Disposal of case on point of law — Action disposed of without trial — Whether question posed under O 14A of the Rules of the High Court 1980 would only dispose of plaintiff's claim and not defendant's counterclaim — Rules of the High Court 1980 O 14A

Contract — Building contract — Construction of terms of contract — Payment of subcontractor under interim certificates — Time as to payment — Whether payment to subcontractor to be made after main contractor received payment — 'Pay when paid' condition — Whether conduct of parties could vary express term of subcontract — Whether alleged past payment reflective of variation of mode of payment — Whether 'pay when paid' condition outright bar to payment

Tunas Selatan Sdn Bhd ('TSSB'), the main turnkey contractor for a project to construct a major hospital ('the project') awarded several contract work packages under the project to the plaintiff. The plaintiff in turn awarded the work packages to the defendant, by way of various letters of award ('the subcontracts'). According to the subcontracts, the defendant was entitled to 95% of the total amount due under the work packages while the plaintiff entitled to retain only 5%. Upon completion of the project, it was agreed that the balance monies payable by TSSB to the plaintiff under the work packages was RM2,567,608.65, which meant that the defendant's entitlement of 95% would amount to RM2,439,228.22. Despite repeated demands for settlement, the plaintiff failed to settle the outstanding sum. This led to the defendant ultimately issuing a notice under s 218 of the Companies Act 1965 ('the statutory notice'). The plaintiff then commenced the present suit against the defendant to restrain the latter from presenting a winding up petition against it. It was the plaintiff's contention that the defendant was only entitled to be paid the sum of RM2,439,228.22 claimed by it after the plaintiff had received its payment of RM2,567,608.65 from TSSB. As such, the plaintiff pleaded that the defendant's statutory notice demanding payment of the sum claimed by it was premature and bad in law. The plaintiff further averred that the defendant was indebted to the plaintiff in the sum of RM334,376.25. The defendant contended that the alleged 'pay when paid' condition relied upon by the plaintiff was fictitious as it contradicted the express term of the subcontracts, which provided that payment was to be paid within 30 days from

the date of the certificates being issued. The defendant thus counterclaimed for the payment of the claimed sum of RM2,439,228.22 from the plaintiff. However, the plaintiff relied on a pattern of past payments by the defendant to argue that the defendant had allowed the plaintiff to believe that it had acquiesced to the 'pay when paid' condition. The plaintiff thus submitted that the defendant was now estopped from asserting that it was entitled to rely on the contractual payment term. The plaintiff thereafter obtained leave to have this entire matter adjudicated vide the determination of two issues under O 14A and O 33 r 5 of the Rules of the High Court 1980 ('RHC'), namely, whether the plaintiff had to pay the defendant only after being paid by TSSB and whether the conduct of the parties can vary the written agreement. It was the defendant's case that the first issue ought to be determined in its favour and that as such there was no need to consider the second issue. The defendant also disputed the plaintiff's claim for RM334,376.25 and submitted that the claim ought not to be determined summarily.

Held, dismissing the plaintiff's claim with costs:

(1) The evidence of the pattern of past payments by the defendant, which was relied upon by the plaintiff, did not transform an express term of the subcontract, as agreed upon by the parties, into a 'pay when paid' condition. The defendant's explanation as to the pattern of past payments and the documentary evidence adduced showed clearly that the pattern of payments was reflective of the agreed security arrangements provided by the financiers of the project. Thus the arrangement on the mode and manner of payments did not in any way transform the character of the contract to one of 'pay when paid', but merely showed the effect of the security arrangements and nothing more. Further, if the 'pay when paid' condition truly existed, the plaintiff would have sought to rely on it at the first available opportunity but the plaintiff failed to produce any correspondence which referred to the 'pay when paid' condition. As such, the 'pay when paid' condition was a mere afterthought to frustrate the defendant's legitimate and admitted claim. The plaintiff had failed to sufficiently prove the existence of such a condition (see paras 53–54, 64 & 66).

(2) In any case, even if the 'pay when paid' condition existed it merely alluded to the time of payment and could not stand as an outright bar to payment (see para 67).

(3) Under O 14A r 1 and O 33 r 5 of the RHC the court has wide powers to give judgment in any matter as it deems fit, including the counterclaim. In the present case, it was found that the 'pay when paid' condition did not exist and that the court had the power to decide on the counterclaim forthwith based only on the present application. As such the plaintiff was

adjudged to pay the admitted amount of RM2,439,228.22 to the defendant forthwith together with interest thereon at the rate of 8% (see paras 75–76, 78 & 86(d)). A

[Bahasa Malaysia summary

Tunas Selatan Sdn Bhd, kontraktor turnkey utama untuk projek membina hospital besar ('projek tersebut') mengawardkan beberapa kontrak pakej kerja di bawah projek tersebut kepada plaintif. Plaintif kemudiannya mengawardkan pakej-pakej kerja kepada defendan, melalui beberapa surat award ('subkontrak-subkontrak'). Mengikut subkontrak-subkontrak tersebut, defendan berhak menerima 95% daripada jumlah amaun yang perlu dibayar di bawah pakej-pakej kerja manakala plaintif berhak memperoleh 5% sahaja. Setelah projek tersebut disempurnakan, adalah dipersetujui bahawa baki wang yang perlu dibayar oleh TSSB kepada plaintif di bawah pakej-pakej kerja tersebut ialah RM2,567,608.65, yang mana bermaksud hak defendan terhadap 95% akan berjumlah RM2,439,228.22. Walaupun berulang kali permintaan dibuat untuk penyelesaian, plaintif gagal untuk menyelesaikan jumlah yang belum dijelaskan tersebut. Ini akhirnya membawa defendan untuk mengeluarkan notis di bawah s 218 Akta Syarikat 1965 ('notis statutori'). Plaintif kemudiannya memulakan guaman ini terhadap defendan untuk menghalang defendan daripada mengemukakan petisyen penggulungan terhadapnya. Ia merupakan hujahan plaintif bahawa defendan hanya berhak dibayar dengan jumlah RM2,439,228.22 yang dituntut olehnya selepas plaintif menerima bayaran sebanyak RM2,567,608.65 daripada TSSB. Oleh itu, plaintif memplid bahawa notis statutori defendan menuntut pembayaran jumlah yang dituntut olehnya adalah pra-matang dan tidak sah dari segi undang-undang. Plaintif selanjutnya menegaskan bahawa defendan berhutang dengan plaintif dalam jumlah RM334,376.25. Defendan berhujah bahawa syarat 'pay when paid' yang diguna pakai oleh plaintif adalah rekaan kerana ia bercanggah dengan terma nyata subkontrak-subkontrak tersebut, yang menyatakan bahawa pembayaran seharusnya dibuat dalam masa 30 hari dari tarikh sijil-sijil tersebut dikeluarkan. Defendan kemudiannya membuat tuntutan balas untuk pembayaran jumlah RM2,439,228.22 yang dituntut daripada plaintif. Walau bagaimanapun, plaintif bergantung kepada corak pembayaran yang lepas oleh defendan untuk berhujah bahawa defendan telah membiarkan plaintif untuk mempercayai bahawa ia telah bersetuju kepada syarat 'pay when paid' tersebut. Plaintif kemudian berhujah bahawa defendan telah diestop daripada menegaskan bahawa ia berhak untuk bersandarkan kepada terma pembayaran kontraktual tersebut. Plaintif selanjutnya memperoleh kebenaran bagi seluruh perkara tersebut untuk diputuskan dengan menentukan kedua-dua isu di bawah A 14A dan A 33 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), iaitu sama ada plaintif harus membayar defendan hanya selepas dibayar oleh TSSB dan sama ada kelakuan pihak-pihak boleh mengubah perjanjian bertulis tersebut. Ianya menjadi kes defendan bahawa isu pertama hendaklah diputuskan bagi

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pihaknya dan oleh itu, adalah tidak perlu untuk mempertimbangkan isu kedua. Defendan juga mempertikaikan tuntutan plaintif untuk RM334,376.25 dan berhujah bahawa tuntutan tersebut tidak harus diputuskan secara ringkas.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Keterangan tentang corak pembayaran yang lepas oleh defendan, yang mana diguna pakai oleh plaintif, tidak mengubah terma nyata subkontrak, yang mana dipersetujui oleh pihak-pihak, kepada syarat 'pay when paid'. Penjelasan defendan mengenai corak pembayaran lepas dan keterangan dokumentari yang dikemukakan menunjukkan dengan jelas bahawa corak pembayaran tersebut mencerminkan persetujuan sekuriti yang disediakan oleh pembiaya-pembiaya projek tersebut. Justeru, persetujuan dalam bentuk dan cara pembayaran tidak sama sekali mengubah sifat kontrak kepada satu 'pay when paid', tetapi sekadar menunjukkan kesan persetujuan sekuriti dan tidak lebih daripada itu. Tambahan, sekiranya syarat 'pay when paid' sememangnya wujud, plaintif sepatutnya telah meminta untuk menggunapakainya apabila peluang pertama wujud tetapi plaintif gagal mengemukakan apa-apa persuratan yang merujuk kepada syarat 'pay when paid' tersebut. Oleh itu, syarat 'pay when paid' adalah sesuatu yang difikirkan kemudian untuk menggagalkan tuntutan defendan yang sah dan diterima. Plaintif telah gagal untuk membuktikan dengan secukupnya kewujudan syarat tersebut (lihat perenggan 53–54, 64 & 66).

(2) Dalam mana-mana kes, meskipun syarat 'pay when paid' wujud, ia hanya menyebut tentang masa pembayaran dan tidak kukuh untuk menghalang pembayaran begitu sahaja (lihat perenggan 67).

(3) Di bawah A 14A k 1 dan A 33 k 5 KMT, mahkamah mempunyai kuasa yang luas untuk memberi penghakiman dalam sebarang perkara yang dianggap berpatutan, termasuk tuntutan balas tersebut. Dalam kes ini, telah didapati bahawa syarat 'pay when paid' tidak wujud dan bahawa mahkamah mempunyai kuasa untuk menentukan tuntutan balas serta-merta hanya berdasarkan kepada permohonan ini. Oleh itu, plaintif telah diputuskan untuk membayar jumlah RM2,439,228.22 yang dimasukkan kepada defendan serta-merta dengan faedah pada kadar 8% (lihat perenggan 75–76, 78 & 86(d)).]

Notes

For cases on construction of terms of contract, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2884–2892.

For cases on disposal of case on question of law in general, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2804–2805.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382, SC (refd)
Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd [2008] 3 MLJ 204; [2008] 3 CLJ 641, CA (distd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Dataran Rentas Sdn Bhd v BMC Construction Sdn Bhd [2008] 2 MLJ 856; [2007] 6 CLJ 613, CA (refd)
Diamond Peak Sdn Bhd & Anor v Tweedie [1980] 2 MLJ 31, FC (refd)
Gek Lau Choon Theatrical Company v Hu Kiang Yan [1937] MLJ 25 (refd)
Heilbut, Symons & Co v Buckleton [1913] AC 30, HL (refd)
Noh Hyoung Seok v Perwira Affin Bank Bhd [2004] 2 MLJ 203; [2004] 2 CLJ 64, CA (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu & Anor Appeal [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)
Royden (M) Sdn Bhd v Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd [1991] 3 CLJ 2935, HC (refd)
Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 5 MLJ 157; [2008] 4 CLJ 217, CA (refd)
Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd [1992] 2 NZLR 473, HC (refd)
Sykt Telekom Malaysia v Business Chinese Directory Sdn Bhd [1996] 3 MLJ 692; [1997] 1 CLJ 596, CA (refd)
Triumphal Enterprises Sdn Bhd v Gan Heah Siew [1981] 2 MLJ 79; [1981] 1 LNS 87, FC (refd)

Legislation referred to

Companies Act 1965 s 218
Evidence Act 1950 ss 91, 92, proviso (b),
Rules of the High Court 1980 O 14A, O 14A r 1(2), O 33 rr 2, 5, O 81
Rules of the Supreme Court O 14A

K Kirubakaran (Kiru & Yong) for the applicant/plaintiff.
Harvinderjit Singh (D'Cruz & Brian) for the respondent/defendant.

Lee Swee Seng JC:

PROLOGUE

[1] Different industries have different legal lingo with its own peculiar interpretation and the construction industry is no exception. Often bandied about as they may appear convenient are the terms 'pay when paid' and 'pay if paid'. Are the two terms materially different one from the other and can the terms of a construction contract where payments are to be made within 30 days upon issuance of the certificate be transformed into a 'pay when paid' or 'pay if

paid' contract by the conduct of the parties? These issues shall be explored as counsel for both the parties expounded on the interpretation of the contract and the implications of their clients' actions.

THE PARTIES

[2] In 2001, the Public Works Department (JKR) appointed Tunas Selatan Sdn Bhd ('Tunas Selatan') as the main turnkey contractor for a project known as 'The design, construction, equipping, commissioning and maintenance of the Hospital Sungai Buloh (620 beds) and the College of Allied Health Science at Sungai Buloh, Selangor' ('the project').

[3] Tunas Selatan in turn awarded several contract work packages under the project to the plaintiff pursuant to several letters of award ('the main contract').

[4] By various letters of award, the plaintiff in turn awarded the work packages to the defendant ('the subcontracts').

PROBLEM

[5] The terms and conditions of the subcontracts are identical. The value of the subcontracts is 95% of the total amount under the work packages. The plaintiff therefore was to retain only 5%.

[6] Clause 9 of the subcontracts is pivotal in the dispute between the parties and it spells out the manner and timing of payment from the plaintiff to the defendant:

(9) the terms of payment shall be as follows:

(a) Period of Interim Payment is monthly based on work done at Site;

(b) Retention shall be 10% up to maximum of 5% of Contract Sum;

(c) Period of Honouring of Certificates is 30 days;

(d) Nominated sub-contractors will be paid directly by Rira Bina Sdn Bhd with GBC Construction Sdn Bhd's consent.

[7] The project was completed on 15 August 2005 and the 24 month defect liability periods under the subcontracts lapsed on 14 August 2007.

See certificate of practical completion, exh AA24 at pp 39–48 of encl 11.

[8] Pursuant to an agreement with Tunas Selatan, it was agreed that the balance monies payable by Tunas Selatan to the plaintiff under the work

packages was RM2,567,608.65. The defendant's entitlement of 95% would be RM2,439,228.22. This amount has been admitted to by the plaintiff in its own final statement of account.

See the plaintiff's final statement of account, exh AA19 at p 98 of encl 8.

[9] No payment was made despite several demands and the defendant ultimately issued a s 218 of the Companies Act 1965 notice dated 27 October 2009 to the plaintiff ('the s 218 notice').

[10] The current suit was brought by the plaintiff as a means of restraining the presentation of a winding up petition by the defendants.

[11] On 17 December 2009, the plaintiff's application for an injunction (encl 3) was allowed for a limited time and directions were made for this matter to be proceeded with in terms of the current application.

PRAYER

[12] On 9 June 2010, this court acceded to the plaintiff's application to have this entire matter adjudicated vide the determination of the following two questions under O 14A and O 33 r 5 of the Rules of the High Court 1980 ('RHC'):

(a) whether or not the plaintiff has to pay the defendant only after being paid by Tunas Selatan Consortium Sdn Bhd; and

(b) whether conduct of the parties can vary the written agreement.

[13] It is defendant's case that question (a) should be answered in favour of the defendant ie the plaintiff has to pay the defendant regardless of payment being received from Tunas Selatan. The defendant submitted that in the event this court answers question (a) as above, question (b) does not need to be determined and this court can then make the following orders:

(a) that the plaintiff's claim as pleaded in the statement of claim be dismissed with costs; and

(b) that judgment in terms of the defendant's counterclaim herein be entered against the plaintiff.

PRINCIPLES

[14] Counsel for the plaintiff relied heavily on the case of *Antah Schindler*

Sdn Bhd v Ssangyong Engineering & Construction Co Ltd [2008] 3 MLJ 204 at pp 210–211; [2008] 3 CLJ 641 at p 649 where His Lordship Suriyadi JCA stated that:

> ... Evidentially as ventilated by the defendant the plaintiff had acquired to the terms of 'pay when paid'. The 41 transactions from 1996–2000, as gauged from the documents, where the plaintiff was never paid within 14 days of receipt of the architect's certificates, and payment only made after the employer had paid the defendant, stood testimony of that acquiescence …

[15] As a corollary, the plaintiff's counsel submitted that the payment pattern as set out in para 16 of the plaintiff's first affidavit and as demonstrated in exh P3 thereto at p 49 'stood testimony' of the defendant's acquiescence to the 'pay when paid' condition.

[16] The defendant had not disputed the payment pattern in para 16 and exh P3 of the plaintiff's first affidavit. However they said that the payment pattern did not vary the contractual payment term, that is, payment within 30 days from the certificates.

[17] The plaintiff boldly asserted that the defendant having allowed the plaintiff to believe that they (the defendant) had acquiesced to the 'pay when paid' condition is now estopped from asserting that the defendant is entitled to rely on the original payment condition.

[18] The plaintiff further argued that the parties by the doctrine of estoppel and acquiescence had varied the payment terms of the contract.

[19] The plaintiff focused the radar on the duration of the period 5 February 2002 to 7 October 2004, where the defendant received 95% of the monies received by the plaintiff from Tunas Selatan. The defendant received a total sum of RM94,905,340.26 being 95% of RM99,752,979.98 received by the plaintiff from Tunas Selatan.

[20] The plaintiff's counsel drew the court's attention to the fact that since the last payment on 7 October 2004 (at p 51 of the BOA) and in 2006 when Tunas Selatan was negotiating the final account with the defendant (at p 53–54 of the BOA) and on 2 January 2007, that is, a meeting between the plaintiff, the defendant and Tunas Selatan and until 23 October 2009 when the defendant wrote the said letter (exh AA21 of the defendant's first affidavit at p 103 of the BOA), the defendant did not pursue its claim against the plaintiff upon the expiry of 30 days from the date of the certificates.

[21] Further, according to the plaintiff's counsel, the defendant in their letter dated 5 January 2007 (p 258 of the BOA) written in response to the plaintiff's letter dated 4 January 2007 (exh P5 at p 57 of the BOA) merely confirmed the final sum due to them, that is RM2,439,228.22. The defendant did not insist on the payment immediately (purportedly upon 30 days from the date of the certificates).

[22] These factual matrix and documentary evidence, the plaintiff concluded, can only lead to one conclusion that is, that the defendant had by its own conduct, led the plaintiff to believe that they will await for their entitlement once the plaintiff received their entitlement from Tunas Selatan.

[23] If the court finds for the two issues in the plaintiff's favour, this court may allow the plaintiff's claim and enter judgment for the plaintiff.

[24] However, if this court finds against the plaintiff on the two issues, then it would follow that the plaintiff's defence of 'pay when paid' condition would fail.

[25] Nevertheless, the plaintiff has yet another claim, that is, in respect of the sum of RM334,376.25. The plaintiff claimed that the defendant is indebted to the plaintiff for the said sum of RM334,376.25.

[26] Paragraphs 18–20 and para 30 of the statement of claim state as follows:

> 18. In the execution of the various Works Contract Packages in Parcel A and Parcel B of the Sungai Buluh Hospital Project, the Defendant was paid an aggregate sum of RM6,687,525.00 being advance payments from the Plaintiff's project costs directly from Tunas or its Chairman ('the said Advance'). As pleaded in paragraph 8 above, the Defendant is only entitled to be paid 95% of the Contract Sum under the Plaintiff-Defendant Sub-Contract.
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> 19. In the premises, the Defendant did at all material times, upon receipt of the said Advance hold the sum of RM334,376.25 which is equivalent to 5% of the said Advance, on trust, for the Plaintiff and is therefore accountable to the Plaintiff for the sum of RM334,376.25.
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> 20. The Plaintiff avers that the Defendant is indebted to the Plaintiff in the sum of RM334,376.25.
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> 30. WHEREFORE the Plaintiff claims:
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> (i) A declaration that the Defendant is only entitled to be paid the sum of RM2,439,228.22 by the Plaintiff only upon and after the Plaintiff receives from Tunes the said sum of RM2,567.608.65;

(ii) A declaration that the Defendant's statutory notice of demand dated 27.10.2009 pursuant to Section 218(2)(a) of the Companies Act, 1965 demanding payment of the sum of RM2,439,228.22 is premature and bad in law;

(iii) The sum of RM334,376.25 under paragraph 19;

(iv) An injunction to restrain the Defendant, or its servant or agents or any of them, or otherwise by any way whatsoever from presenting or commencing Winding-Up proceedings against the Plaintiff pursuant to the statutory notice of demand dated 27.10.2009 issued under Section 218(2)(a) of the Companies Act, 1965;

(v) Interest on the sum of RM334,376.25 due to the Plaintiff at the rate of 8% per annum from the date of Judgment until date of full settlement;

(vi) Costs; and

(vii) Such further and/or other relief or order as this Honourable Court deems fit and proper.

[27] The defendant has disputed the claim of RM334,376.25 and contended that claim cannot and ought not to be determined summarily.

[28] The plaintiff's counsel referred to the following cases in support of his proposition:

(a) *Sykt Telekom Malaysia v Business Chinese Directory Sdn Bhd* [1996] 3 MLJ 692; [1997] 1 CLJ 596 (CA);

(b) *Noh Hyoung Seok v Perwira Affin Bank Bhd* [2004] 2 MLJ 203; [2004] 2 CLJ 64;

(c) *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400;

(d) *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382.

[29] The defendant's case can be summarised as follows:

(a) The alleged 'pay when paid' condition is fictitious.

(i) the 'pay when paid' condition is misconceived as it contradicts the express terms of the subcontracts;

(ii) The plaintiff's contentions on the 'pay when paid' condition cannot be relied on as it contradicts the parol evidence rule — ss 91 and s 92 of the Evidence Act 1950; and

(iii) the evidence relied on by the plaintiff as to the pattern of past payments has nothing to do with the alleged 'pay when paid' condition.

(b) It is abundantly clear that the plaintiff's reliance on the 'pay when paid' condition is an afterthought.

(c) The alleged 'pay when paid' condition as contended by the plaintiff does not equate to a 'pay if paid' condition and therefore even if such a condition exists, the plaintiff is still liable to pay the defendant forthwith.

(d) The 'pay when paid' condition cannot be relied upon as the plaintiff itself owes Tunas Selatan over RM40,000,000.

THE PAY WHEN PAID CONDITION IS FICTITIOUS

The 'pay when paid' condition is misconceived as it contradicts the express terms of the subcontracts

[30] The defendant submitted that at no time did the parties mutually agree to vary cl 9 of the subcontracts in the manner alleged by the plaintiff.

[31] Clause 9 of the subcontracts is clear in that the time limited for payment by the plaintiff was within 30 days of certificates being issued. The plaintiff's alleged 'pay when paid' clause contradicts the very essence of this express provision.

[32] The defendant's counsel further contended that there is absolutely no evidence of such an agreement to vary cl 9 of the subcontracts in oral form or in writing. The allegations contained in the plaintiff's affidavits regarding the said 'pay when paid' condition are vague, obscure and incapable of being enforced and/or is void for uncertainty.

[33] The defendant's counsel referred to the instructive case of *Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473 at p 478, where the defendant main contractor attempted to raise a similar argument to defeat the plaintiff subcontractor's claim for payment. The learned Master Towle noted the formalities in which parties to building contracts regulated themselves and held:

> It seems however that if parties wish to regulate their liability to pay the party with whom they are in subcontract and to prescribe that their liability arises only in so far as they themselves receive payment from the owner of head contractor they must do so by express agreement. It could not be seriously suggested that there could be implied into any contract made between a contractor and subcontractor that the latter was only to be paid once the head contractor had been paid, for this would involve as acceptance by the subcontractor of the financial viability of the entire project.

[34] And later on at p 481:

> While I accept that in certain cases it may be possible for persons contracting with each other in relation to a major building contract to include in their agreement clear and ambiguous conditions which would have to make it clear beyond doubt that the arrangement was to be conditional and not to be merely governing the time for payment. I believe the contra proferentem principle would apply to such clauses and that he who seeks to rely upon such a clause to show that the clauses relied upon contain no ambiguity.

[35] The contract in the present case was not a small building contract. It dealt with the construction of a major hospital. The parties had from the outset regulated their relationship in the subcontracts.

[36] The defendant's counsel submitted firmly that if there was such an agreement to vary it would have been done in writing or at the very least in some sort of meeting. This was not what the plaintiff alleged here.

[37] Furthermore, if the circumstances of *Smith & Smith Glass Ltd* case are looked at, the court has held that the exact clause which sought to make payment conditional must be read strictly against the party seeking to rely on it. Any doubt or ambiguity must favour the unpaid party. On these facts there is no such clause. There was merely an allegation that the parties had varied the terms of payment without more.

[38] The defendant's counsel castigated the plaintiff's stand by stating that the poverty of the plaintiff's argument is further apparent when the other cases which deal with a 'pay when paid' condition are analysed. They are all cases which deal with express provisions in one form or the other which seek to defer the time of payment.

See *Dataran Rentas Sdn Bhd v BMC Construction Sdn Bhd* [2008] 2 MLJ 856; [2007] 6 CLJ 613, *Royden (M) Sdn Bhd v Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd* [1991] 3 CLJ 2935, *Engineering & Construction Contracts Management — Post Commencement Practice*, (2002), Ir Harbans Singh KS, LexisNexis at pp 385–392.

[39] Thus the defendant's counsel submitted that in the absence of a clear and unambiguous express term, or at the very least precise details of such an agreement, this court should reject the plaintiff's contentions on the existence of the 'pay when paid' clause. With that contention this court is much attuned.

The plaintiff's contentions on the 'pay when paid' condition cannot be relied on as it contradicts the parol evidence rule — ss 91 & 92 of the Evidence Act 1950

[40] The exact contention of the plaintiff regarding the 'pay when paid ' condition is as follows:

... it was agreed between the Plaintiff and the Defendant that the Defendant's right to be paid for work done under the Plaintiff-Defendant Sub Contract is conditional upon the Plaintiff having been paid by Tunas under the Tunas — Plaintiff Sub Contract (hereinafter referred to as 'the Pay When Paid Condition'): see para 15.1 of encl 2.

I am advised by the Plaintiff's Solicitors and I verify believe and state that the alleged reasons for the 'Pay When Paid' Condition does not alter the fact that the original terms of payment was indeed varied by the Plaintiff and the Defendant: see para 9.1 of encl 7.

[41] It was therefore suggested that the 'pay when paid' condition was a variation of the original terms of the subcontracts. It was not suggested that the parties entered into a collateral contract or any sort of oral agreement which is consistent with the terms of the original contract.

[42] It is trite law that a party should not be permitted to adduce evidence of any oral agreement to vary or contradict the terms of an original contract in writing. This is known as the parol evidence rule and is encapsulated in ss 91 and 92 of the Evidence Act 1950.

[43] It was submitted that the contentions of the plaintiff herein cannot be acceded to as the plaintiff's case does not come within any of the proviso to s 92 of the Evidence Act 1950 which read as follows:

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

A (e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

B (f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

See s 92 of the Evidence Act 1950.

C **[44]** Illustration (b) to s 92 is precisely pertinent to the plaintiff's position. Illustration (b) reads as follows:

(b) A agrees absolutely in writing to pay B RM1,000 on the first of March 1893. The fact that at the same time an oral agreement was made that the money should not be paid till the 31st of March cannot be proved.

D

[45] In *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157; [2008] 4 CLJ 217 the plaintiff alleged that there was a collateral contract wherein the parties agreed to a limit on the number of units to be manufactured by their operations. In rejecting the evidence of the E existence of such a collateral contract, the Court of Appeal held at pp 164–165 (MLJ) and at p 226 (CLJ):

F The doctrine of collateral contract or agreement is recognised in this country by virtue of proviso (b) to s 92 of the Evidence Act 1950 which allowed to be admitted in evidence any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms. Unless the additional evidence sought to be introduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add or subtract from the terms of the agreement.

G

[46] Buttressed on the above principle, the defendant's counsel submitted that the plaintiff's position of the existence of the 'pay when paid' condition is untenable.

H

[47] This court would likewise follow the above sound principles of interpretation of contracts, otherwise there will be no certainty in its terms and especially when the parties have by clear words defined the payment terms after having assessed the risks attendant in any project of this size and scope.

I

The evidence relied on by the plaintiff as to the pattern of past payments has nothing to do with the alleged 'pay when paid' condition

[48] The so-called 'evidence' relied on by the plaintiff as to the existence of

the 'pay when paid' condition is the pattern of past payments which reveals that payments from the plaintiff to the defendant were preceded with payments from Tunas Selatan to the plaintiff.

[49] The defendant's counsel stated that this court must consider the plaintiff's evidence with much circumspection. The plaintiff's case is essentially that the parties to this major construction contract suddenly decided to change the agreed manner of payment and the defendant agreed to make its payments conditional on payments being received by the plaintiff first. It is prima facie an economically illogical agreement especially so in the construction industry where cash flow is the 'life blood' of the industry.

[50] The words of caution calling for a careful consideration of any party who seeks to transform the character of a written contract to read as something else are captured in the House of Lords decision of *Heilbut, Symons & Co v Buckleton* [1913] AC 30:

> But such collateral contracts must from their very nature be rare … Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore *viewed with suspicion by the law. They must be proved strictly*. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn. *Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject matter*. (Emphasis added.)

[51] The same sentiment and suspicion was expressed in *Gek Lau Choon Theatrical Company v Hu Kiang Yan* [1937] MLJ 25 at p 26 as follows:

> This I take to mean that the more formal the written document is, the more suspicious the court must be as to the existence of a collateral contract, and if the contract is informal less suspicion attaches to the attempt to set up a collateral contract.

[52] In a similar vein in *Smith & Smith Glass Ltd*'s case, it was observed as follows at p 482:

> In the few cases where pay when paid clauses have been enforced to the letter, the courts have usually respected the trial court's finding of fact that the parties truly directed their minds to the passing of the risk of the owner's insolvency from the contractor to the subcontractor. Where, however, relevant testimony is either conflicting or insufficient such that no such finding may be made on this point, the courts have typically been unwilling to presume that the subcontractor intended to accept this risk.

[53] I accept the defendant's explanation as to the pattern of past payments and the documentary evidence adduced showed clearly that the pattern of payments is reflective of the agreed security arrangements provided to the financiers of the project, Alliance Bank Bhd. This security arrangement was put in place by agreement and action of all parties. The arrangement was as follows:

(a) as the plaintiff was unable to procure sufficient financing for the project, the defendant applied for the requisite facilities from Alliance Bank Bhd;

(b) vide three offer letters, Alliance Bank agreed to provide the financing for the project: see exhs AA11–AA13 of encl 8;

(c) however by way of security, Alliance Bank required the plaintiff to open two escrow accounts with Alliance Bank ('the plaintiff's escrow accounts') and the defendant was also required to open two escrow accounts ('the defendant's escrow accounts');

(d) the plaintiff and defendant were then made to sign a deed of assignment of contract proceeds for the benefit of Alliance Bank;

(e) the plaintiff was then required to issue an irrevocable standing instruction to Tunas Selatan to remit all contract proceeds in to the plaintiff's escrow accounts; and

(f) finally the plaintiff was required to execute a further irrevocable standing instruction to Alliance Bank Bhd requiring Alliance to remit 95% of payments received from Tunas Selatan directly into the defendant's escrow accounts: see exhs AA14–AA18 of encl 8.

[54] Thus the arrangement on the mode and manner of payments does not in any way transform the character of the contract to one of 'pay when paid' but it translates the exact securitisation for the facilities insisted by Alliance Bank: the pattern of past payments exhibited by the plaintiff merely showed the effect of such an arrangement and nothing more. I am in agreement with the defendant's counsel on that. It looks like what started off as a neat and nice way for the defendant to achieve a win-win solution because of the difficulty of the plaintiff to obtain financing for the project, has been elevated through some evolutionary process to become a 'pay when paid' contract, much to the chagrin and consternation of the defendant.

[55] The defendant's counsel also pointed out what is conspicuous by its absence: not even an iota of evidence as to the exact agreement on the 'pay when paid' condition, nay not a single correspondence on it.

[56] The only case which deals with a so-called 'acquiescence' of a 'pay when paid' condition by a subcontractor based on patterns of past payments is the case of *Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd*

[2008] 3 MLJ 204; [2008] 3 CLJ 641. However, as pointed out by the defendant's counsel, that case is miles apart from the instant case based on the following distinguishing factors:

(a) in that case, the 'pay when paid' condition existed is the form of an express provision in the main contract which the court held was incorporated into the subcontract (cl 27(a)(vii));

(b) the past payments which formed the basis of the subcontractors acquiescence was linked directly to this express provision; and

(c) even with the express provision and the subcontractors acquiescence thereto the Court of Appeal held that the contractor was still liable to pay the subcontractor forthwith as the relevant clause only imposed a time limit for payment and not a bar to payment.

See pp 646, 649 and 650 (CLJ) of *Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd* [2008] 3 MLJ 204; [2008] 3 CLJ 641.

[57] In the circumstances, the defendant's counsel submitted that the plaintiff has failed to sufficiently prove the existence of the 'pay when paid' condition. I agree that the evidence relied on by the plaintiff does not unambiguously prove the requisite *animus contrahendi* that the parties directed their minds and agreed to pass the risk of the project on to the defendant.

The alleged 'pay when paid' condition is an afterthought

[58] The defendant's counsel invited the court to look at the context in which the plaintiff issued its final account statement to Tunas Selatan on 4 January 2007 (copied to the defendant). Apart from the admission that RM2,439,228.22 is owed to the defendant, there is no mention of a 'pay when paid' condition. The defendant wrote to the plaintiff vide a letter dated 5 January 2007 to confirm that outstanding payment due was RM2,439,228.22. The plaintiff did not respond to contradict this. See exh AA10 of encl 8.

[59] During the course of time, the defendant had issued several demands to the plaintiff for payment of the RM2,439,228.22. See the defendant's letter dated 1 September 2009 in exh P6 of encl 2.

[60] In the plaintiff's reply dated 2 September 2009, no mention is made of the 'pay when paid' condition. In fact, the plaintiff's position in the letter dated 2 September 2009 was that the defendant would be paid directly by Tunas Selatan. This in itself is evidence of the plaintiff's approbation and reprobation. See exh P7 of encl 2.

[61] The defendant responded to this with a further demand for payment dated 23 October 2009 wherein the defendant denied any arrangement was made for payment to come directly from Tunas Selatan. This letter was not replied to by the plaintiff. See exh AA22 of encl 8.

[62] The plaintiff further wrote to Tunas Selatan vide a letter dated 6 November 2009 stating that Tunas Selatan was to directly pay all amounts owing to the defendant. This again is inconsistent with the plaintiff's current stand. See exh P5A of encl 2.

[63] In response to the plaintiff's letter dated 2 September 2009, the defendant sent a letter dated 23 October 2009 to Tunas Selatan denying any agreement for direct payments to be made. Tunas Selatan in turn confirmed that they had no 'contractual relations' with the defendant. See exh AA21 of encl 8.

[64] Clearly if the 'pay when paid' condition truly exists, the first available opportunity to rely on the same would have been in the plaintiff's responses to the defendant's demands. However there is not even a single letter sent out by the plaintiff which refers to or reflects the 'pay when paid' condition. I agree with the defendant's counsel that this is quite telling!

[65] The very first time the so called 'pay when paid' condition was raised was in the affidavit in support filed by the plaintiff in these proceedings.

[66] I accept the defendant's counsel contention that the 'pay when paid' condition is merely an afterthought raised by the plaintiff to defeat and frustrate the defendant's legitimate and admitted claim.

The alleged 'pay when paid' condition as contended by the plaintiff does not equate to a 'pay if paid' condition and therefore even if such a condition exists, the plaintiff is still liable to pay the defendant forthwith

[67] I find merits in the the defendant's argument that even if the 'pay when paid' condition alleged by the plaintiff exists, such a clause merely alludes to the time for payment. It cannot stand as an outright bar to payment. This is even more so since the project has been successfully completed by the defendant more than five years ago!

[68] In this regard the authorities clearly make a vital distinction between:

(a) a 'pay when paid' condition, which merely means the contractor can delay payment until the same is received from the employer of the main contractor up to a reasonable time; and

(b) a 'pay if paid' clause which grants the contractor absolute protection against payment to the subcontractor until and unless payment is made by the employer of main contractor,

as pointed out in *Engineering & Construction Contracts Management — Post Commencement Practice*, (2002), LexisNexis by Ir Harbans Singh KS at pp 385–392.

[69] A 'pay when paid' clause has never been interpreted to be an absolute bar to payment. On the other hand a 'pay if paid' clause must be clear and unambiguous in its effect before the court will lend credence to it. The following passages from the authorities clear the confusion that some may have on the actual meaning of 'pay when paid' contracts:

> By the very language alluded to in the relevant provisions of the current main contract and subcontract, read together with cl 27(a)(vii), we had construed the latter as a mere provision imposing a time limit for payment. We found no express provision mounted which imposed any restriction over the rights of the plaintiff to pursue its claim against the defendant … It was our view that, since it was not unambiguously express in cl 27(a)(vii) that the plaintiff was to be denied its rights from pursuing the claim in the current format, this action was procedurally correct: *Antah Schindler Sdn Bhd*'s case at p 211 (MLJ) and p 650 (CLJ); and
>
> The court there held that that clause could not be interpreted to mean 'if' the subcontractor was to be paid but rather 'when' it was to be paid. It interpreted the clauses in that case as relating to the time when a contractor must pay the subcontractor and not to the issue of whether the subcontractor got paid at all... For myself I believe that unless the condition precedent is spelled out in clear and precise terms and accepted by both parties, then clauses such as the two particular ones identified in this proceedings do no more than identify the time at which certain things are required to be done, and should not be extended into the 'if' category to prevent a subcontractor who has done the work from being paid merely because the party with whom he contracts has not been paid by someone higher up the chain: *Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473 at pp 481–482.

[70] The defendant's counsel therefore submitted that, in light of the vague and ambiguous terms of the 'pay when paid' condition, this court cannot hold that such a condition bars the defendant from payment. This is even more so since the plaintiff is unable to even precisely define the terms of this alleged condition. In the light of the authorities cited I would agree with the defendant's counsel that a 'pay when paid' condition, even assuming for a moment that it had been agreed upon, does not prevent the defendant from claiming the final sum of RM2,439,228.22 from the plaintiff forthwith.

The 'pay when paid' condition cannot be relied upon as the plaintiff itself owes Tunas Selatan over RM40,000,000

[71] The defendant stumbled upon another disclosure that would finally

and firmly, once for all settle this issue and that is that the plaintiff owes Tunas Selatan a sum exceeding RM40,000,000 for another separate highway project, to which arrangement the defendant is not privy. See exh AA26 of encl 11.

[72] I agree with the defendant's counsel that in light of the plaintiff's substantial indebtedness to Tunas Selatan for the other highway project, it is entirely improbable and wholly unlikely that Tunas Selatan will ever pay the plaintiff the sum of RM2,567,608.65 for the Sungai Buloh Hospital project.

[73] Thus if this court were to hold that the 'pay when paid' condition is an absolute bar to the defendant's claim, it is likely that the defendant will never paid at all. This surely cannot be just.

[74] There is an alternative argument of the defendant's counsel which i found attractive and it is this: that the sum of RM2,567,608.65 payable by Tunas Selatan to the plaintiff for the Sungai Buloh Hospital project can be taken and deemed as duly paid to the plaintiff by contra and set off against the plaintiff's substantial indebtedness to Tunas Selatan.

[75] In the final analysis this court answered the questions posed in favour of the defendant as follows:

(a) this court rejected the existence of a 'pay when paid' clause; and

(b) even if there is a 'pay when paid' clause, there is no evidence to show that such a clause was meant to be an absolute bar to the defendant's claim herein. Thus the plaintiff is still liable to pay the defendant forthwith.

[76] There was one other interesting point raised by the plaintiff's counsel and it was that the disposal of the questions posed under O 14A of the RHC would only dispose of the plaintiff's claim and cannot dispose of the defendant's counterclaim. The defendant on the other hand maintained that this court has the power to decide on the counterclaim forthwith based only on the present application. The entire suit can be summarised as follows:

(a) the plaintiff's claim as pleaded is in fact akin to a defence to the defendant's claim for the admitted amount;

(b) the prayers seek to uphold the existence of the alleged 'pay when paid' condition;

(c) the defence and counterclaim is in fact the defendant's replies to the plaintiff's defences and a claim for the admitted amount; and

(d) the plaintiff has conceded that the entire defence rests on the 'pay when paid' condition.

[77] In agreeing to the O 14A / O 33 r 2 application on the identified questions, the defendant submitted that the plaintiff had conceded to the entire dispute being determined. The plaintiff cannot now argue that there should be a separate determination of the counterclaim. This would make a complete mockery of these proceedings.

See pp 360–361 (CLJ) of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu & Anor Appeal* [2004] 1 MLJ 8; [2003] 4 CLJ 337.

[78] Further under O 14A r 1(2)/ O 33 r 5, the court has wide powers to give judgment in any manner it deems fit. See O 14A r 1(2)/ O 33 r 5 at Tab 1 of the DBA.

[79] The issues in this trial (as currently pleaded) are simple. If the 'pay when paid' condition does not exist, the plaintiff must be adjudged to pay the admitted amount to the defendant forthwith. If not, any order made by this court in the present application would be toothless.

[80] The plaintiff sought reliance on the case of *Diamond Peak Sdn Bhd & Anor v Tweedie* [1980] 2 MLJ 31 to assert that the court cannot give judgment on the counterclaim in these proceedings. With respect, this is a misreading of this case.

[81] In *Diamond Peak*, the appellant sued for specific performance on a contract for the sale of land. The appellant applied under O 14A of the Rules of the Supreme Court for specific performance. The respondent applied to remove the appellant's caveat on the land. Both applications were heard together. Arulanandon J dismissed the O 14A, allowed the respondent's application to remove the caveats and dismissed the appellant's entire claim on the basis that there was no concluded contract between the parties.

[82] On appeal the court held that the learned judge did not have the power to dismiss the entire action under O 14A of the RSC. As there were triable issues the court should have granted the respondent leave to defend and have the matter tried.

[83] The critical point is that the matter was based on the former O 14A of the Rules of the Supreme Court. Order 14A of the RSC was the forerunner of the present O 81 of the RHC 1980.

See *Triumphal Enterprises Sdn Bhd v Gan Heah Siew* [1981] 2 MLJ 79; [1981] 1 LNS 87.

[84] The case of *Diamond Peak* has no bearing on the present O 14A of the RHC 1980 which was inserted vide PU(A) 342/2000 wef 1 September 2000. See PU (A) 342/2000.

[85] I take the view that this court has wide powers to dispose of the entire suit, including the counterclaim based on the clear provisions in O 14A r 1(2) and O 33 r 5 of the RHC and the above distinction drawn with respect to the case of *Diamond Peak* is a valid one.

PRONOUNCEMENT

[86] It is hereby ordered that:

(a) question (a) above is answered 'no';

(b) question (b) above need not be answered;

(c) the plaintiff's claims as contained in the writ and statement of claim dated 10 November 2009 are dismissed save and except for the issue on the sum of RM334,376.25 which is to be tried;

(d) the judgment on part of the defendant's counterclaim is entered against the plaintiff wherein the plaintiff shall pay the defendant a sum of RM2,104,851.97 (ie the sum of RM2,439,228.22 minus RM334,376.25) together with interest at the rate of 8% from 15 August 2007 until the date of full realisation; and

(e) on the undertaking of counsel for the plaintiff to file the plaintiff's application to amend the defence to counterclaim dated 25 August 2010 on 20 September 2010, execution on the judgment ordered in para (d) above shall be stayed on an interim basis pending the disposal of the plaintiff's application to amend the defence to counterclaim dated 25 August 2010.

[87] I also ordered that costs of RM15,000 shall be paid by the plaintiff to the defendant.

POSTSCRIPT

[88] A one syllable word such as 'when' and 'if' in the context of a construction contract payment clause whether it be 'pay when paid' or 'pay if paid' is not as innocuous as it appears to be; indeed it has implications of far reaching consequences. Only those in the construction industry are perhaps most aware and appreciative of this for they are most affected by it as payment is the lifeblood of the industry.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan